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The Perils of Differentiated Integration in the Field of Asylum

in A. Ott and B. De Witte (eds.) *Between Flexibility and Disintegration The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing, 2017)

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Abstract

This chapter examines the level of differentiated integration and its consequences in relation to asylum matters in the EU, focusing in particular on the position of the UK. It identifies a distinction between ‘formal differentiation’ and ‘informal flexibility’. Formal differentiation includes the official agreements concluded with the UK, Ireland and Denmark allowing these countries to participate or not to participate in asylum measures to pre-determined degrees. Informal flexibility results from uneven or mal-implementation, which is to some extent tolerated by the EU Institutions. This chapter argues that at the heart of a harmonisation project is the necessity for the limitation of the discretion of participating Member States to legislate differently in a specific area, and this is particularly important with regard to the EU’s asylum project because of the persistence of the Dublin Regulation’s ‘one chance of asylum’ rule. Asylum is not only a field which directly affects the lives of vulnerable individuals, but is heavily regulated by international and human rights norms. It is therefore questionable whether there should be any provision for formal flexibility arrangements. Under current arrangements the UK is in practice permitted to cherry-pick in a highly selective manner, participating in the Dublin system for instance, but refusing to be bound by the legally enforceable minimum standards legislation which arguably comprise one of the few safeguards attached to the Dublin system. Furthermore, the widespread uneven implementation across the EU among Member States bound by the asylum directives constitutes a high level of informal flexibility, putting in jeopardy the protection of asylum seekers. This tension puts a question mark over the extent to which the project of harmonisation of asylum systems can sustain both the existing formal differentiation arrangements and informal flexibility.

Introduction

Since the EU has expanded, both in size and competence, differentiation in levels of willingness to integrate and in political, socio-economic and cultural terms has become an increasingly prominent feature.¹ According to Monar differentiation in relation to immigration and asylum matters “has emerged primarily in order to allow for the pursuit of a ‘deepening’ of integration in circumstances in which the full participa-

The author would like to thank Bruno de Witte and Liam Thornton for comments on earlier drafts of this paper.

¹ W. Van Gerven, *The Economic Union: A Policy of States and Peoples* (Oxford: Hart Publishing, 2005) 28-29 and 31-32 cited in M. Fletcher, ‘Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom’s “Ins” and “Outs”’ *European Constitutional Law Review* 5 (2009), 73.

tion of some countries is not possible”.² Maria Fletcher has observed that for the EU, as a “flexible and evolving legal order”, there is “a fine line between the stagnating impact of accommodating too little and the fragmenting impact of accommodating too much diversity”.³ Fletcher has argued that CJEU judgements along with Lisbon’s opt in/out protocols suggest that the EU places “a more explicit emphasis on incentivising maximum participation and disincentivising a ‘pick and choose’ and ‘free rider’ mentality to flexibility”.⁴ This chapter argues that the field of asylum should be entirely free from differentiated integration arrangements. In being a field of law which directly affects the rights of individuals in a context in which their physical survival and psychological wellbeing is at risk, the field of asylum is unlike other competences of the EU where there is scope for differentiated integration.

The chapter’s focus is the UK, a Member State with a flexible opt-in in relation to asylum and immigration matters. The chapter identifies a distinction between formal differentiation and informal flexibility, both of which can be conceived of as differentiation that is provided for in the field of asylum. Formal differentiated integration entails the official agreements concluded with the UK, Ireland and Denmark, which either enable or exclude participation of these countries in asylum matters to predetermined degrees. These formal arrangements have serious consequences for the integrity of the EU’s asylum system. Under current arrangements the UK is in practice permitted to cherry-pick in a highly selective manner, participating in the Dublin system for instance, but refusing to be bound by the legally enforceable minimum standards legislation which arguably comprise one of the few safeguards that might mitigate the potential for harm in the ‘one chance of asylum’ rule.

Informal flexibility describes the EU’s tolerance of uneven or mal-implementation of agreed asylum standards. At Tampere in 1999, the European Council agreed ‘to work towards establishing a Common European Asylum System [CEAS], based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, ie maintaining the principle of non-refoulement’.⁵ In its effort to create a CEAS, whereby the same minimum standards of protection and procedures apply in the field of asylum to participating Member States across the EU, the EU has passed a series of directives. These contain numerous discretionary clauses leaving Member States a wide scope for implementing diverse standards of protection. The most recent EU legislation to be passed in the field has neither sufficiently ameliorated this situation, nor has the European Commission adopted as vigilant an enforcement approach as it has in other legal fields⁶ in relation to the asylum directives where

² J. Monar, ‘The “Area of Freedom, Security and Justice”: “Schengen” “Europe”, Opt-outs, Opt-ins and Associates’ in K. Dyson and A. Sepos (eds.), *Which Europe? The Politics of Differentiated Integration* (Palgrave, 2010), 289.

³ M. Fletcher, note 1 above, 72.

⁴ Ibid.

⁵ Tampere European Council Presidency Conclusions 1999, para 13.

⁶ See for example, J. Tallberg, ‘Making States Comply: The European Commission, The European Court of Justice, and the Enforcement of the Internal Market’ *Lund Political Studies* (1999), 109.

Member States have failed to properly implement their provisions, or Court judgments relating to them. The EU's tolerance of this situation suggests it has acquiesced to a scope for flexibility outside formally agreed differentiated integration arrangements.

The chapter begins by examining the current status of formal differentiated integration in the field of asylum. It then turns to consider the scope for informal flexibility and the harmful consequences of the interplay between uneven and mal-implementation of asylum measures and the Dublin system.

Formal differentiated integration in the field of asylum

The current state of play in relation to formal differentiated integration in the field of asylum is as follows: The UK, Ireland and Denmark are not participating in the second-phase asylum directives on qualification, reception conditions and procedures, which apply to all other Member States.⁷ However, the UK and Ireland continue to be bound by the first-phase qualification and procedures directives and the UK remains bound by the first-phase reception conditions directive. All Member States are bound by the recast Dublin and Eurodac measures, as are some associated countries.⁸ Denmark is the only Member State not bound by the rules on the refugee fund and the asylum support office.⁹

In a Protocol to the 1999 Treaty of Amsterdam, the UK, Ireland and Denmark secured opt-outs from EU treaty provisions on immigration, asylum and civil law. Unlike Denmark, which cannot opt in, the British and Irish opt-outs allow for the countries to choose whether or not to participate in the discussions on legislation in this area. While the UK has cooperated closely on asylum and refugee policy with the other EU Member States for many years, the latest developments in British policy suggest that a new period characterising the UK's attitude towards the Common European Asylum System has dawned. Maria Fletcher has argued that since the introduction of opt ins and outs "into the EU governance armoury at the Maastricht Treaty, the United Kingdom...has exploited the...mechanism as a tool of diversity management to the greatest extent".¹⁰ In practice, with regard to asylum, until recently the UK has opted out of

⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337/9 20.12.2011; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180/96 26.6.2013; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180/60 29.6.13.

⁸ Norway, Iceland, Switzerland and Liechtenstein.

⁹ The associated countries are negotiating an agreement with the EU to participate in the asylum support office. See Proposal for a Council Decision on the conclusion of the Arrangement with the Republic of Iceland on the modalities of its participation in the European Asylum Support Office COM/2013/0875 final.

¹⁰ M. Fletcher, note 1 above, 74.

nearly all proposals concerning visas, borders, and legal migration, but has opted into all proposals concerning asylum and civil law and nearly all proposals concerning illegal migration.¹¹ Tony Blair, in an interview on 25 October 2004 described the UK's position as follows:

With the Treaty of Amsterdam seven years ago, we secured the absolute right to opt in to any of the asylum and immigration provisions we wanted to in Europe. Unless we opt in, we are not affected by it. And what this actually gives us is the best of both worlds.¹²

After years of having regularly opted in, the approach of the UK and Ireland has changed and their participation in common policies on illegal migration and asylum policy has become more selective, something that has been criticised by former Justice and Home Affairs Commissioner Vitorino, who has argued that opt-outs in this area “undermine burden-sharing”.¹³ Not only did the UK government's recent opt-outs go against the advice of the House of Lords European Union Committee,¹⁴ as well as the UNHCR,¹⁵ but they have been widely criticised by lawyers, NGOs and academics.¹⁶ One of the principal reasons for these objections is that the new directives do contain, however limited, provisions which are designed to at least marginally improve protection of asylum seekers, as discussed below. Furthermore, ILPA has noted that the second-phase instruments are intended in part to “strengthen the homogeneity and consistency of the determination of claims for international protection across the European Union”.¹⁷ The UNHCR stated that in its view, “the proposed recast Directives would contribute to, rather than undermine, the objective of swift and fair decision-making in the Member States of the European Union, and would contribute to the reduction of secondary movements between Member States”.¹⁸

The UK's distancing itself from any further formalisation of asylum norms at the EU

¹¹ The Irish practice has been almost identical to that of the UK.

¹² Government pledges to opt out of common EU asylum system, By Nigel Morris and Stephen Castles in Luxembourg, *The Independent*, Tuesday, 26 October 2004

¹³ Ibid.

¹⁴ House of Lords European Union Committee, *Asylum directives: scrutiny of the opt-in decisions* (1st Report of Session 2009-10, HL Paper 6, 4 December 2009).

¹⁵ UNHCR, ‘Briefing to the House of Lords on the adoption and application of the proposed EU Asylum Procedures and Qualifications Directives’ (UNHCR, London, January 2010). Available at: http://www.unhcr.org.uk/info/briefings/responding_to_policy/documents/LordsBriefingonEUDirectives.pdf (Last visited 24 May 2013).

¹⁶ See for example, ILPA, ‘Immigration Law Practitioners’ Association briefing for House of Lords Debate 12 January 2010 on the UK opt-in to the draft EU Asylum Procedures Directive and Qualifications Directives’. Available at: <http://www.ilpa.org.uk/briefings/10%2001%2012%20HL%20Debate%20Procedures%20&%20Qualification%20Directives.pdf> (Last visited 24 May 2013).

¹⁷ Ibid., 2.

¹⁸ See UNHCR, ‘Briefing to the House of Lords on the adoption and application of the proposed EU Asylum Procedures and Qualifications Directives’ (UNHCR, London, January 2010). Available at: http://www.unhcr.org.uk/info/briefings/responding_to_policy/documents/LordsBriefingonEUDirectives.pdf (Last visited 24 May 2013), 2.

level by opting out of the latest phase of asylum directives is problematic for a number of reasons. First, its continued participation in the Dublin Regulation while opting out of the (nevertheless aspirational) level playing field that forms the justification for the mutual recognition of asylum decisions is to be questioned, if not in practice, then in principle. In 1990 the Dublin Convention was signed,¹⁹ limiting the number of claims for protection an individual could make to one and establishing a system for the allocation of responsibility for asylum applicants between Member States. The Convention came into force in 1997. The Dublin Regulation is now the central binding instrument for the implementation of the ‘safe third country’ concept, which assumes that all EU countries are safe for the purposes of returning asylum seekers, and incorporates the Dublin Convention into EU legislation.²⁰ The rules for the determination of responsibility for hearing the claims of asylum seekers are premised on the notion that responsibility lies with the first Member States with which an asylum applicant establishes contact, whether by issue of a transit visa, legal presence of a close family member, or, in the absence of these, the first physical contact with the territory.²¹ Even if the UK’s treatment of asylum seekers is of a standard high enough for it to be considered a so-called safe country for asylum seekers, its refusal to sign up to the legally enforceable safeguards that underlie the Dublin system raise questions as to whether the EU should in principle tolerate such cherry-picking in respect of a sensitive area of law that directly affects the lives of vulnerable individuals.

The UK opted out of the revised asylum measures at a very early stage in the legislative process. Although the proposals did not meet the UK’s restrictive preferences at the time it opted out, the measures were yet to be negotiated and ultimately were watered down by the Council, despite the European Parliament’s efforts to the contrary. One of the reasons the UK ‘exited’ rather than stayed ‘loyal’²² to the European asylum legislative project is because of the importance of the notion of discretion in the historical evolution of its asylum regime. While it considers the Dublin and Eurodac regulations to be contributing to its ability to administer asylum, it sees the limitation of discretion entailed in the asylum directives, their rights-enhancing nature and the prospect of increased judicialisation of asylum as posing a challenge to its discretionary purview over its protection regime. The UK considered some of the proposed elements as putting in jeopardy its ability to reduce the number of asylum seekers on its territory, deter ‘false applicants’ and control its borders. In respect of border control, we have seen the UK’s reticence most clearly in its opt out of Schengen. The

¹⁹ Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 15 June 1990 [1997] OJ C254/1.

²⁰ Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ L180/31 29.6.2013. See further, N. El-Enany, ‘EU Asylum and Immigration Law Under the Area of Freedom, Security, And Justice’ in A. Arnall and D. Chalmers, *The Oxford Handbook of European Union Law* (OUP, 2015).

²¹ *Ibid.*, Articles 7-15.

²² A. O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, And States* (Harvard University Press: Cambridge, Massachusetts, 1970).

UK's treatment of the second phase of asylum directives suggests that it is unwilling to consider change that does not accord with its domestic policy agenda. This attitude is compounded by its flexible opt out which allows it to retreat from European cooperation as and when it pleases.

Despite the UK's rejection of the possibility of further legislative cooperation on asylum at the EU level, it has declared itself an active promoter of European collaboration, so long as this is confined to "practical cooperation".²³ This is however, neither a comparable nor adequate alternative to legislation which guarantees visible, enforceable standards of protection. The Commission has insisted that practical cooperation methods "are insufficient, on their own, to adequately and comprehensively address the problems which flow from the ambiguities and possibilities for derogations in the legislation itself".²⁴ While the other Member States must, whatever the extent of their discomfort with the proposed directives, sit down around the negotiating table, the position of the UK is different. For the UK, having an opt out means that in instances where it is inclined to be restrictive, it neither has to justify its asylum regime choices as reasonable, sensible, moral or defensible, nor to compromise on its individual preferences.

Discretion and improper implementation as informal flexibility

Since the emergence of the EU asylum regime, there have been increasing pressures for reform, originating both from within the EU governance framework and outside. The failings of the first round of asylum directives were seen to have various effects, ranging from inbuilt inefficiency to curtailing the rights of those seeking asylum in the EU. In 2008, the Commission released a Policy Plan,²⁵ which was the product of a public consultation in the form of a Green Paper presented in 2007.²⁶ The objective of the Green Paper was to identify "the possible options for shaping the second phase of the CEAS", which was set out in the 2004 Hague Programme as being the creation of a common asylum procedure and a uniform status for those granted refugee status or subsidiary protection.²⁷ The European Council 2010 Stockholm Programme, which followed the Tampere Programme (1999-2003) and the Hague Programme

²³ See for example, evidence given by James Brokenshire MP, then Parliamentary Under-Secretary of State and Minister for Crime Prevention, Home Office, to the House of Lords European Union Committee, House of Lords European Union Committee, *The Treaty of Lisbon: An Impact Assessment: Vol. I Report* (10th Report, Session 2007-2008), 125-6.

²⁴ European Commission, *Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast)* – Impact Assessment SEC (2009) 1371, 4.

²⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the 'Policy Plan on Asylum: An Integrated Approach to Protection Across the EU' of 17 June 2008 COM(2008) 360.

²⁶ European Commission 'Green Paper on the future Common European Asylum System' Brussels, 6.6.2007 COM(2007) 301 final.

²⁷ The Hague Programme, *Strengthening Freedom, Security and Justice in the European Union*, Presidency Conclusions, Brussels 4/5 November 2004.

(2004-2009) expressed a commitment to achieve the CEAS by 2012 and noted that “[i]t is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment”, but that “[t]here are still significant differences between national provisions and their application...Common rules, as well as a better and more coherent application of them, should prevent or reduce secondary movements within the Union, and increase mutual trust between Member States”.²⁸ However, the 2010 Stockholm Programme was concerned primarily with ensuring the “security” of the Union from perceived threats,²⁹ such as irregular migration. The European Council reiterated the Union’s goal of preventing or reducing “secondary movements” of asylum seekers³⁰ and described the Dublin system as the “cornerstone in building the CEAS”.³¹

According to the 2009 Lisbon Treaty, the initial Tampere objectives of creating a “uniform status of asylum” to be “valid throughout the Union” are legal obligations.³² In its 2008 Policy Plan, the Commission reported on three trends it identified through statistical analysis and which were to inform developments in asylum policy. The first trend was that the Member States, bar “some border States”, were “under less pressure than in the recent past”, leading the Commission to conclude that the time was right for working to improve the quality of protection standards in the EU.³³ Secondly, the Commission reported that despite the achievement of some level of legislative harmonisation at the EU level, “a lack of common practice, different traditions and diverse country of origin information sources are, among other reasons, producing divergent results”. According to the Commission, the differing implementation records of the Member States was working against the principle of providing equal access to protection in the Union as well as creating secondary movements.³⁴ Finally, the Commission found that where individuals are granted protection, an increasing number received subsidiary protection or another form of protection based on national law rather than refugee status according to the 1951 Refugee Convention. As a result, the Commission highlights the importance of paying particular attention to subsidiary and other forms of protection during the second phase of the CEAS.³⁵ While sub-

²⁸ The Stockholm Programme, An Open and Secure Europe – Serving and protecting Citizens, OJ C 115/1 4.5.2011.

²⁹ See T. Bunyan, *Commission Action Plan on the Stockholm Programme: A bit more freedom and justice and a lot more security* (Statewatch, 2011).

³⁰ European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens OJ C115/1 2010.

³¹ Ibid.

³² Article 78 TFEU. See S. Peers, ‘The second phase of the Common European Asylum System: A brave new world - or lipstick on a pig?’ (Statewatch, 8 April 2013), 1.

³³ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions: Policy Plan on Asylum, An integrated approach to protection across the EU. Brussels 17.6.2008 COM (2008) 360 final, section 1.2.

³⁴ Ibid.

³⁵ Ibid.

sidiary protection has been dealt with in the new directives, the problems associated with national forms of protection remain.

Along with the trends identified by the Commission in its Policy Plan it also reports on several shortcomings in relation to the first phase of CEAS legislative instruments. In view of these problems, coupled with the concern that the minimum standards delimited in the first-phase directives had failed to fulfil the objective of creating a level playing field, the Commission expressed its intention to put forward proposed amendments to the existing directives as well as to consider the possibility of new instruments.³⁶ With regard to the Reception Directive, it identified a number of problems “largely due to the discretion allowed to Member States in a number of key areas”. Thus, the Commission states that the amended version “should contribute to achieving a higher degree of harmonisation and improved standards of reception, so as to limit the scope of such issues to drive secondary movements”.³⁷ The wide discretion left to the Member States is identified as a general problem in relation to the first round of asylum directives. The first Procedures Directive was referred to in the Policy Plan as allowing for “diverse procedural arrangements”, which along with “qualified safeguards” result in “different results when applying common criteria” for identifying those in need of protection. This was said to harm “the very objective of ensuring access to protection under equivalent conditions across the EU”.³⁸ In support of its intention to significantly amend the directive, the Commission referred to the TFEU as well as the Hague programme, which both call for the establishment of a common asylum procedure.³⁹ With regard to the first Qualifications Directive, the Commission reports on the significant variation in the recognition of protection needs of applicants from the same countries of origin.⁴⁰ According to the Commission, this is in part due to “the wording of certain provisions” of the Qualifications Directive.⁴¹

In part to deal with these problems, the Commission proposed a set of ‘recast’ legislative proposals in 2008.⁴² The five principal measures comprising the CEAS were

³⁶ Ibid., section 3.

³⁷ Ibid., section 3.1.

³⁸ Ibid., section 3.2.

³⁹ Ibid.

⁴⁰ Ibid., section 3.3.

⁴¹ Ibid.

⁴² Recasting is a legislative technique used in the EU context whereby in cases where a substantive amendment needs to be made to an existing legal act, the Commission can propose a single legal act for adoption, which introduces the desired amendment whilst also codifying that amendment with the unchanged provisions of the earlier act and repealing that act. See European Parliament, Council and Commission, Interinstitutional Agreement on a more structured use of the recasting technique for legal acts of 28 November 2001 (2002/C 77/01) OJ C 77/1 28.3.2002.

updated as part of the second phase of the system's evolution.⁴³ Progress made as regards protection differs to a minimal extent between each of the second-phase measures. In general, any progressive change to the first-phase directives is largely the result of the influence of the European Parliament, whose success in having its amendments adopted varied across the second-phase instruments.

The Qualifications Directive saw improvements in relation to the rules on qualification as a refugee. For instance, the definition of "family members" has been expanded to include children who are not dependents,⁴⁴ and allows for the possibility of protection where authorities fail to protect against persecution by non-State actors.⁴⁵ While the second phase directive improves the situation as regards differential treatment between those granted subsidiary protection as compared with refugee status, Member States are still able to discriminate in this regard in relation to the granting of residence permits and access to social security.⁴⁶

Aspects to note regarding improvements made to the Reception Conditions Directive relate to the delimiting of measures on detention, accommodation and access to employment for asylum seekers. In relation to employment, asylum seekers are to be granted access to the labour market after nine months of waiting for a first instance decision on their asylum claim.⁴⁷ The rules on accommodation have been altered to insist that Member States "take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment" when accommodating asylum seekers.⁴⁸ The Directive has been marginally improved through a reduction in

⁴³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337/9 20.12.2011; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180/96 26.6.2013; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180/60 29.6.13; EU Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ L 180/31 29.6.2013; EU Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) OJ L 180/1 29.6.2013.

⁴⁴ Qualifications Directive, Article 2 (j).

⁴⁵ Ibid., Article 6 (c).

⁴⁶ Ibid., Article 24 (2) and Article 29 (2).

⁴⁷ Reception Conditions Directive, Article 15 (1).

⁴⁸ Ibid., Article 18 (4).

grounds for detention⁴⁹ and enhancing conditions⁵⁰ and reducing the possibilities for Member States to reduce or withdraw reception conditions.⁵¹ However, as Peers has pointed out, “the revised Directive does not improve the reception conditions for asylum seekers very significantly, and while Member States face some restrictions as regards the detention of asylum-seekers, they still retain a great degree of discretion”, e.g. with regard to detaining asylum seekers, in relation to their giving them access to social security and “due to limits on legal aid”, it will be “difficult in practice to challenge any of these decisions”.⁵²

The Procedures Directive has seen a number of developments, including improvements in relation to access to asylum procedures. For instance, the Directive introduced a three day time limit for registering new claims.⁵³ There is a time limit for the making of a decision on a claim of six months, but this can be extended up to 21 months under certain conditions.⁵⁴ The Directive introduces a right to an effective remedy where an application for refugee status is refused.⁵⁵ However, several problems with the Directive remain. For example, it is not clear whether the shortened list of circumstances in which Member States may accelerate asylum procedures is non-exhaustive.⁵⁶ If so, as Peers has noted, “the reduction in the list is irrelevant”.⁵⁷ A new optional exception has been added to the rules on legal aid that are applicable to appeals whereby Member States may deny legal aid to “applicants who are no longer present on their territory”.⁵⁸

Mal-implementation plagued the initial directives and, in view of the marginal alterations made in the recast versions, is likely to persist as a problem in relation to the second phase directives. There will, therefore, continue to be a need for the CJEU to clarify Member State obligations under the directives. The Council’s unwillingness to be bound in a discretion-free manner to minimum standards of protection which meet international and human rights obligations necessitates court rulings on the interpretation of EU asylum provisions. Indeed, considering the protracted and difficult nature of the recent round of negotiations, reliance on the Court is only remaining route toward uniform standards of protection across the Union. Since the agreement of the Lisbon Treaty, the CJEU has enjoyed general jurisdiction over the whole of the Area

⁴⁹ Ibid., Article 8.

⁵⁰ Ibid., Article 10.

⁵¹ Ibid., Article 20.

⁵² S. Peers, note 32 above, 5.

⁵³ Procedures Directive, Article 6 (1).

⁵⁴ Ibid., Article 31 (3), (4) and (5).

⁵⁵ Ibid., Article 46 (1).

⁵⁶ Ibid., Article 31 (8).

⁵⁷ S. Peers, note 32 above, 15.

⁵⁸ Procedures Directive, Article 21 (2).

of Freedom, Security and Justice. The preliminary reference procedure is no longer limited to national courts or tribunals against whose decisions there is no judicial remedy, but is available to all national courts.⁵⁹ Arguably, the Court of Justice's activity in this area has led to some limited legal protection for the rights of individuals. This has primarily taken place through the CJEU's interpretation of substantive provisions of EU law. However, thus far, uniformity and complete application of the asylum directives have not been achieved through the extension of the Court's jurisdiction.⁶⁰ According to Peers, the problem of mal-implementation:

[...]should have been ameliorated somewhat by the increased jurisdiction for the Court of Justice on asylum matters following the Treaty of Lisbon, but the increase in its case load has only been modest and reportedly a number of Member States' authorities and courts are finding ways to refuse to implement the Court's judgments properly.⁶¹

The lack of sufficient reform as well as the issue of improper implementation is relevant to the subject of differentiated integration. A harmonization project demands at least a basic level of commitment among Member States to pull together to create a level playing field. However, in the field of asylum, what we see is Member States purporting to be in support of a harmonization project, but are reluctant to make alterations to their domestic legal frameworks or indeed cede any significant measure of control to the supranational institutions. We have seen that Member States are not only dispassionate about adopting exception and discretion-free minimum standards, but that they are also reticent about implementing court judgements where these uphold an interpretation of the law, or indeed seek to enforce law, that is undesirable to Member States. This suggests that if there were more opportunity for Member States to be accommodated through formal differentiated integration measures, we might find that more follow the example of the UK. According to Peers, reducing "divergences in application of the EU rules" and ensuring "their correct implementation" is likely to require the adoption of "further legislation harmonizing standards" as well as "new methods of ensuring its implementation, for example a vigorous enforcement policy by the Commission, the creation of a common asylum court or joint processing of applications".⁶²

Although it is indeed the case that a higher degree of harmonisation is needed, it seems that Member States will not be willing to embark on a further legislative project in the near, or perhaps even distant, future. Having only just emerged from an arduously long and fraught legislative process, we can safely assume that the level of harmonisation we currently have is the level at which the EU will halt for some time to come. It is evident that cooperation in this field will remain an uphill struggle in light of the divergence of the views of the Member States, the Commission and in-

⁵⁹ See House of Lords European Union Committee, *The Treaty of Lisbon: An Impact Assessment: Vol. I Report* (10th Report, Session 2007-2008), 125-6.

⁶⁰ See A. M. Collins, 'Recent developments in asylum and immigration law before the Court of Justice' *ERA Forum* (2009) 9 581-590.

⁶¹ S. Peers, note 32 above, 8.

⁶² *Ibid.*

deed the European Parliament, on what is to be considered a sufficient level of harmonisation.

Despite the fact that the second phase directives have now been agreed, the preceding years of negotiation and prolonged stalemate are nevertheless revealing of the level of cooperation in the EU on asylum matters. As mentioned above, the changes brought in by the new directives are overall not significant despite the long wait. The Commission was forced to withdraw its more ambitious earlier proposals for new directives due to general unwillingness amongst Member States to enhance asylum standards. Instead, for the most part, we have seen watered down versions adopted in their place with the legislative process following the usual pattern: the Council watering down the Commission's semi-ambitious proposal, followed by the European Parliament's insertion of some protective measures, some of which were ultimately accepted and some rejected by the Council.

The incompatibility of differentiated integration with the Dublin system

At the heart of a harmonisation project is the necessity for the limitation of the discretion of participating Member States to legislate differently in a specific area, and this is particularly important with regard to the EU's asylum project because of the persistence of Dublin's 'one chance of asylum' rule. In view of this it is questionable whether any level of formal differentiated integration or informal flexibility should be tolerated. The dreadful effects of the interaction between the Dublin system and a context of differing levels of reception conditions became apparent in the case of *MSS v Belgium and Greece*, a landmark case in being the first in which the ECtHR has held that the transfer of an asylum seeker between two EU countries under the Dublin rules was in violation of a series of Convention rights by both the sending and receiving state. Unlike the case of *TI v UK*,⁶³ where the Court had ruled that the transfer in question was lawful because the asylum seeker would have the opportunity to make a new asylum claim in Germany and receive effective protection, this was not the case in respect of a transfer from Belgium to Greece. The *MSS* case concerned an Afghan asylum seeker whose first contact with the Union was Greece, but who claimed asylum in Belgium. The Belgian authorities returned the individual to Greece in accordance with the Dublin II Regulation, requesting that Greece accept responsibility for the applicant. On arrival, the individual was placed in a detention centre close to Athens airport, locked in a small space with 20 other detainees, could only access toilets with the guards' permission, was not allowed out into the open air, was given very little food and forced to sleep on a filthy mattress or on the bare floor.⁶⁴ On his release, the applicant was not provided with accommodation by the authorities and so, having no means of subsistence, lived in a park in central Athens.⁶⁵ The Court held that both the conditions in which the applicant was detained and his living circumstances outside detention amounted to a breach of Article 3 of the Convention. The

⁶³ *TI v United Kingdom* [2000], Application No. 43844/98 ECHR

⁶⁴ *MSS v Belgium and Greece* [2011] Application No. 30696/09, para. 34.

⁶⁵ *Ibid.*, para. 37.

applicant had received no assistance from the Greek authorities despite its obligations under the EU Reception Directive. The Greek authorities were also held to be in breach of Article 13 in conjunction with Article 3 as a result of their failure to properly examine the applicant's asylum claim and the risk he faced in being deported to Afghanistan without a full examination of the merits of his case or access to an effective remedy. Belgium was also held liable for a breach of Convention Article 3 as well as Article 13 in conjunction with Article 3. The Court considered that the deplorable conditions facing asylum seekers in Greece were well known to the Belgian authorities, citing for example a letter sent to the Belgian Minister for Migration and Asylum Policy by the UNHCR two months prior to the individual's return to Greece in which the deficiencies of the asylum procedure in Greece were set out and a recommendation made to suspend transfers to Greece.⁶⁶ *MSS v Belgium and Greece* differed from *K.R.S v UK*⁶⁷ in that at the time the latter was decided there was, according to the ECtHR, an 'absence of proof' that Greece was not complying with its obligations under the Reception Directive and Article 3 of the ECHR. The Court therefore decided on 'the information available at the time' to both the UK and itself that sending individuals back to Greece was not in violation of the Convention. In *MSS v Belgium and Greece*, the Court drew upon a wealth of documents produced by the UNHCR, the European Commissioner for Human Rights, Amnesty International, Human Rights Watch, Pro-Asyl and the European Council on Refugees and Exiles, the Greek Helsinki Monitor and the Greek National Commission for Human Rights in order to conclude that Greece was not a safe destination country for asylum seekers for the purposes of the Convention and that in returning an individual there, Belgium was in violation of a number of its provisions.⁶⁸

The ECtHR noted in the *MSS* judgement the problematic way in which the Dublin II Regulation functioned. It drew attention to the high proportion of non-EU nationals entering the Union through Greece.⁶⁹ Asylum seekers fingerprinted there under the Eurodac system are liable to be returned to Greece for processing. Although Greece was criticised for not having a proper and functioning asylum procedure or adequate detention and accommodation facilities, the ECtHR expressed concern that Greece was under significant pressure. It stated as follows:

...States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. The situation is exacerbated by the transfers of asylum seekers by other Member States in application of the Dublin Regulation. The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all in the present context of economic crisis.

The Court regards the Dublin system as aggravating the situation by increasing pressures on border states such as Greece. Indeed, as part of the reform package prepared

⁶⁶ Ibid., para. 16.

⁶⁷ *K.R.S. v. United Kingdom*, [2008] Application no. 32733/08

⁶⁸ *MSS v Belgium and Greece*, note 64 above, paras. 343 and 348.

⁶⁹ *MSS v Belgium and Greece*, note 64 above, para. 125.

by the Commission and proposed in 2008, it had put forward a proposal to redraft the Dublin Regulation.⁷⁰

The case of *MSS* has influenced the Court of Justice of the European Union judgment in the case of *NS*.⁷¹ The case deals with an Afghan asylum seeker's challenge of a decision taken by UK authorities to return him to Greece in accordance with the Dublin Regulation. The Court held that an asylum seeker cannot be returned to a country where there is a serious risk her rights under the EU Charter of Fundamental Rights will be violated, which may require setting aside the Dublin rules on the allocation of responsibility for asylum claims between Member States. While it was asserted that the EU's obligations under the ECHR and the Refugee Convention meant that the Dublin rules did not in principle breach the Charter, where a country such as Greece failed to comply with its human rights obligations leading to a situation of a serious risk of breach of an individual's rights under the Charter, transfer under the Dublin regulation would be incompatible with the Charter. The overloading of the Greek asylum system created a serious risk of breach of Articles 1 (right to dignity), 4 (freedom from torture and inhuman and degrading treatment or punishment) 18 (respect for the rules of the Refugee Convention) and 19(2) (*non-refoulement*) of the Charter. Therefore, the UK's irrebuttable presumption that all Member States are safe for asylum seekers is in breach of the EU Charter, while a rebuttable presumption is permissible (para. 178). Breaches of a Member State's obligations under EU law which did not violate human rights obligations would not however demand a suspension of the Dublin rules. However, Steve Peers has noted that, "[g]iven the close connection between the EU asylum legislation and fundamental rights obligations, it will not always be easy to establish whether a Member State is 'merely' breaching EU legislation, or is also breaching the Charter".⁷²

While the Court of Justice agreed with the ECtHR that the operation of the Dublin Regulation should be limited in the case of systematic deficiencies in the asylum systems of receiving Member States amounting to a real risk of a breach of Article 3 ECHR and the corresponding provision, Article 4, in the Charter of Fundamental Rights, the Court of Justice made clear that this was exceptional and that not all infringements of fundamental rights will affect Member States' other obligations under the Dublin Regulation.⁷³ Since this case, the ECtHR has amplified its standard of protection, insisting that States party to the ECHR make an individual assessment of the level of human rights protection in receiving EU countries when implementing Dublin transfers.⁷⁴ In its recent Opinion that the agreement on the EU's accession to the ECHR was incompatible with primary EU law, the CJEU argued that the principle

⁷⁰ COM (2008) 820 final/2; The ECtHR made reference to the Commission's proposal in paras. 77 and 78 of its judgement in *MSS v Belgium and Greece*, note 64 above.

⁷¹ Joined Cases C-411/10 and C-493/10 *NS and Others v. SSHD and M.E. and Others v Refugee*.

⁷² S. Peers, note 32 above, 2-3.

⁷³ *Ibid.*, paras. 82-83.

⁷⁴ *Tarakhel v Switzerland* (2015) 60 EHRR 28.

of mutual trust, as exemplified by the Dublin system, does not allow for individual assessment of other countries' behaviour except in the narrowly defined circumstances of the NS case. Bruno de Witte and Sejla Imamovic have argued that the Court's argument "boils down to a claim that EU law should be allowed to give *less protection* than the Convention requires to certain rights in certain circumstances: namely, to the rights at stake in mutual recognition situations in the area of freedom, security and justice".⁷⁵

ECRE has stated that 'the Dublin system's harmful effects go beyond those caused by the currently imperfect CEAS,' and calls for the system to be dismantled and replaced with one based on free choice of the asylum applicant as to which state examines her claim.⁷⁶ The disastrous effects of the interplay between the workings of the Dublin system in a context of differing levels of reception conditions was made clear in the case of *MSS v Belgium and Greece*. Different levels of protection across the Member States 'produce an "asylum lottery" in the EU'.⁷⁷ ECRE reports that 2005 recognition rates for Chechens varied from approximately 0 per cent in Slovakia to 90 per cent in Austria. The problem is also significant in the case of Iraqis with 2007 recognition rates showing an 87.5 per cent success rate in Cyprus, 85 per cent in Germany, 82 per cent in Sweden, 30 per cent in Denmark, 13 per cent in the UK and 0 per cent in Slovenia and Greece.⁷⁸ With these figures in mind, depriving asylum seekers of the choice of where to seek asylum in the EU on the premise that they receive the same treatment across the Member States seems ludicrous. ECRE has warned that 'Lack of equal protection can create a real risk of *refoulement*, and thus of failing to conform to international legal obligations'.⁷⁹ The contribution of the Dublin system to the pressure on border states creates the risk that these states will work to limit access to their territories or to asylum procedures.⁸⁰ There is also the danger that asylum seekers will try to avoid being transferred or even escape the asylum system altogether.⁸¹ In this way the Dublin system can transform 'a visible flow of asylum seekers into a covert movement of irregular migrants that is even more difficult for states to count and control'.⁸² Jonathan Aus has noted the 'immediate reaction' of asylum seekers seeking

⁷⁵ B. de Witte and S. Imamovic, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' *European Law Review* (2015) 40, 702.

⁷⁶ ECRE, Comments on the European Commission Proposal to recast the Dublin Regulation (April 2009), 3 and 4.

⁷⁷ Ibid.

⁷⁸ ECRE, *Five years on Europe is still ignoring its responsibilities towards Iraqi refugees* (March 2008), cited in *ibid.*, 15.

⁷⁹ ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered* (March, 2008), 16.

⁸⁰ ECRE, *The Way Forward Towards Fair and Efficient Asylum Systems in Europe* (September 2005), 13.

⁸¹ ECRE, note 79 above, 16.

⁸² G. Loescher, 'Forced Migration in the Post-Cold War Era', in B. Ghosh (ed.) *Managing Migration: Time for a New International Regime?* (Oxford University Press: Oxford, 2000).

protection in Nordic countries to Eurodac, which as discussed above is designed to complement the Dublin System by requiring the fingerprinting of all asylum seekers on entry in order to enable transfers, has been to ‘deliberately *cut or burn their fingertips*...A member of the *Swedish Migration Board* reported “scars from knives and razors, or entire [fingerprint] patterns that are entirely destroyed because they’ve used acid or some other kind of product to destroy their hands””.⁸³

The Dublin system is indefensible in a context which lacks full harmonisation. It is simply not compatible with a system that does not include the following: *all* Member States participating in Dublin sign up to providing the same high level of protection to all asylum applicants (including in reception, procedures and recognition rates, etc.); all Member States actually provide this protection *in practice*. Neither of these conditions are satisfied at present. The UK has opted out of the second phase of asylum directives, but in to the Dublin and Eurodac regulations. Implementation remains a serious problem across the board, with Greece providing an example of a country simply unable to deal with the volume of applicants it receives.

Despite the case law of the European courts, the focus in amending the Dublin Regulation was enhancing the efficiency of the system, rather than increasing protection standards. This is despite the fact that system has long been in need of a complete overhaul, or indeed abolition, considering its effect of placing a hugely disproportionate burden on Southern European States, which are struggling to manage arrivals and facing significant economic challenges. The Dublin system has led “to significant human rights abuses”,⁸⁴ acknowledged by the European courts. In spite of this, “radical reform of Dublin rules was never seriously considered”.⁸⁵ Minor improvements include the rules on detention, which ban detention of an asylum seeker merely because the Regulation is applicable.⁸⁶ An exception is stipulated in cases where there is a “significant risk of absconding” enabling Member States to detain an asylum seeker where there are “reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third- country national or a stateless person who is subject to a transfer procedure may abscond”.⁸⁷ In such cases, detention must be “proportional and other less coercive alternative measures cannot be applied effectively”⁸⁸ and detention must “be for as short a period as possible”.⁸⁹

⁸³ J. P. Aus, ‘Eurodac: A Solution Looking for a Problem? *European Integration Online Papers* Vol. 10 (2006), 12. (Emphasis in original).

⁸⁴ *Ibid.*, 8.

⁸⁵ S. Peers, note 32 above, 6.

⁸⁶ Dublin Regulation, Article 28 (1).

⁸⁷ *Ibid.*, Article 2 (n).

⁸⁸ *Ibid.*, Article 28 (2).

⁸⁹ *Ibid.*, Article 28 (3).

The revised Dublin Regulation codifies the decision of the Court of Justice of the European Union in *NS* and *ME*⁹⁰ with regard to the suspension of transfers,⁹¹ but the Commission failed to have its proposed formal procedure for suspension adopted. Nevertheless, the European Parliament was successful in influencing changes to the new rules on a mechanism for early warning and crisis management, which includes an express reference to the fundamental rights of asylum seekers.⁹² Peers has noted that had the Commission's proposal to suspend the Dublin system in instances of human rights abuse been successful, this would "not have fixed the underlying illness, but only treated the symptoms", and yet "even that proposal was rejected by the Council".⁹³ The result is that "[a]ny significant change in the Dublin rules will therefore remain – as with the first-phase Regulation – in the hands of the courts".⁹⁴

The Eurodac Regulation, which obliges the taking of fingerprints of all asylum seekers and individuals who cross the external borders of Member States irregularly, principally for the purpose of enabling the operation of the Dublin system, has seen a number of changes in the second phase instrument. The most significant amendment is that national law enforcement agencies as well as Europol are granted access to the database.⁹⁵ Peers has warned that this "risks stigmatising large categories of foreign citizens, including those whose refugee and subsidiary protection status has been recognised".⁹⁶

Conclusion

This chapter has argued that differentiated integration, neither in the form of official agreements, nor in the form of informal flexibility, should be tolerated in the field of asylum. Formal differentiated integration arrangements have enabled the UK to adopt a cherry-picking approach to participation in the CEAS. While the UK has opted into the Dublin system, it has opted out of the second phase directives which comprise legally enforceable minimum standards designed to reduce differences in protection standards across the Union. However, the asylum directives, in their allowing Member States a wide scope of discretion in interpretation and application are themselves productive of informal flexibility. There remain vast differences in practice between Member States in their treatment of asylum seekers, for instance in relation to recognition as refugees. This is compounded by the Commission's lack of vigilance as regards enforcement of the directives coupled with Member States' unwillingness to properly implement CJEU rulings. Asylum is a field which directly affects the lives of

⁹⁰ Joined Cases C-411/10 and C-493/10 *NS and Others v. SSHD and M.E. and Others v Refugee*.

⁹¹ Dublin Regulation, Article 3 (2).

⁹² *Ibid.*, Article 33.

⁹³ S. Peers, note 32 above, 8.

⁹⁴ *Ibid.*

⁹⁵ Articles 5, 6, 7, 19-21, 33 and 36.

⁹⁶ S. Peers, note 32 above, 10.

vulnerable individuals and is heavily regulated by international and human rights norms. In view of this, it has been argued that there should be no provision for formal and informal flexibility. This tension created by existing formal and informal flexibility arrangements puts in question the integrity of the CEAS in its accommodation of a situation of no equivalence of protection across Member States despite the persistence of the Dublin ‘one chance of asylum’ rule.

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